FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 22 1946
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,

Petitioner,

vs.

SOUTHERN PACIFIC CO., A CORPORATION,

Respondent

PETITIONER'S REPLY BRIEF ON MERITS

GILBERT E. THIEL,
Petitioner pro se,
% Allen Spivock,
1025 Russ Building,
San Francisco 4, Calif.

INDEX

Subject Index

	Page
Petitioner's reply brief on merits	1
Plaintiff's motion to strike out entire panel	2
The evidence summarized	2
Grounds for motion to strike panel	6
Mostly business men selected and workingmen excluded	6
Selection methods make it impossible for plaintiff to win	9
No appointment by districts	11
Discrimination against women as jurors	12
Discrimination against other races	13
Failure of judges to prescribe rules	13
No prior examination of jurors	13

Table of Cases Cited

Clinton v. *Englebrecht*, 13 Wall. 343	14
Glasser v. *U. S.*, 315 U. S. 60	2, 6, 7, 8
Mamaux v. *U. S.*, 264 Fed. 816	6
Norris v. *Alabama*, 294 U. S. 587	10
Pointer v. *U. S.*, 151 U. S. 396	13
Pratt v. *Pratt*, 74 Pac. 742, 141 Cal. 247	11
Rawlins v. *Georgia*, 201 U. S. 638	8
U. S. v. *Ballard*, 35 Fed. Supp. 105	12
U. S. v. *Chaplin*, 54 Fed. Supp. 682	12
U. S. v. *Meyer*, 113 F. (2d) 387	7, 12
U. S. v. *Rocmig*, 52 Fed. Supp. 857	12
Walker v. *U. S.*, 95 F. (2d) 383	7

Statutes Cited

California Code of Civil Procedure:	
Section 198	7, 13
Section 199	13
Section 200	7, 12, 13
Section 205	13
Constitution of the United States, 7th Amendment	11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,

Petitioner,

vs.

SOUTHERN PACIFIC CO., A CORPORATION,

Respondent

PETITIONER'S REPLY BRIEF ON MERITS

A short reply should be made to Respondent's Brief of 101 pages received by Petitioner on March 13, 1946.

It is significant that defendant and respondent Southern Pacific Co. still makes no reply whatever to the ADMITTED *purposeful* blanket exclusion of "ALL the iron crafts, bricklayers, carpenters and *machinists*" (R. 47) which includes plaintiff and petitioner's class as a "machinist or mechanic," or to the ADMITTED *purposeful* discrimination against women as jurors (R. 49). Defendant's attempted justification for the *purposeful* exclusion of daily wage earners will be shown to be without any legal or even practical foundation.

Plaintiff will not endeavor to answer all of defendant's misstatements of the law and garbled versions of the Record as it would require a lengthy brief.

Record references to pages 1 to 141 are to the *printed* Record.

Plaintiff's Motion to Strike Out Entire Panel

Plaintiff will confine this Reply to his Motion to Strike Out the Entire Panel, as now limited by this Supreme Court. The Motion contains 7 stated grounds (R. 10) which will be discussed in order of importance after a brief summary of the evidence taken thereon.

The Evidence Summarized

The evidence presented by plaintiff on his said Motion (R. 9-52) stands wholly uncontradicted in the Record here. In addition to the affidavit of his counsel (R. 10), plaintiff presented in *full* corroboration thereof the testimony of the Clerk (R. 27-46) and the Jury Commissioner (R. 46-52) and also the testimony of two prominent, experienced and successful jury trial attorneys (R. 16, 23). Said affidavit covers all of said 7 grounds and gives some definite substantiation thereof (R. 11-15). It is admissible here under the rule of *Glasser* v. *U. S.*, 315 U. S. 60, 87, because it is *supported* by the following testimony:

Briefly, the Clerk testified that he selects half the jurors and the Jury Commissioner selects the other half (R. 27); that he generally selects "people who I think, from their *occupation and residence*, would be intelligent people to act as jurors" (R. 28); that if a man is listed as "a longshoreman, I do *not* put his name in" (R. 29); that all "day laborers" were "*purposely*" left out (R. 32, 44) because they might lose money (R. 30, 31); that "the number of men who might be *mechanics*, janitors, or of the labor class" "would be a small percentage" (R. 32) or "about *20%*" (R. 36); that the "*majority*" "would be business people and their wives" with "responsible positions" (R. 32); that "there would be AT LEAST 50% of *this* panel who are business men, or the wives of business men" (R. 36) "who had *responsible*

positions, and had pretty *substantial* salaries" (R. 37); that *no effort* is made to apportion jurors by districts (R. 33); that *no effort* is made to equalize the percentage of men and women as jurors (R. 32); that *no effort* is made to fairly represent different races (R. 33); that *no rules* for selecting jurors are prescribed byt he judges (R. 32); that the above procedure "applies to the list" in this case (R. 35).

The Jury Commissioner testified that his answers would "be pretty much the same as" the Clerk's (R. 46); that "AT LEAST 50% of those men selected" are "either *business* men or CONNECTED WITH SOME BIG BUSINESS concern" (R. 47); that he omits *all* "carpenters" (R. 47); that he "EXCLUDES PURPOSELY" "ALL the iron craft, bricklayers, carpenters and MACHINISTS" (R. 47); that he "definitely OMITS from the jury list" all those that "are of the *highest class* in the *labor world*" (R. 47); that he has no recollection of ever selecting a "laborer" (R. 48); that he knew his "duty was merely to select a CROSS-SECTION of the people in San Francisco who might be impartial and fair jurors" (R. 48), but he made no attempt "to get a CROSS-SECTION of people of San Francisco with regard to wealth" (R. 51); that he has "PURPOSELY put on *more men* than women" (R. 49); that he has no facilities for investigating jurors; that the Federal Judges have *not* given him "any *directions* or *rules* as to how" he "should go about selecting jurors" but "leave it *entirely* to" him (R. 49); that he is *not familiar* with the State Code sections governing selection of jurors (R. 49); that he prepares his list of names for the jury panel "in *two* or *three* days" (R. 49); that *no effort* is made to put any Negroes or Chinese on said list (R. 49); that the above method of selection was used for this case (R. 51); that "AT LEAST 50%" of the names selected are from the "BUSINESS DISTRICT of San Francisco" (R. 51).

Vincent Hallinan, a prominent jury trial lawyer of 22 years practice (R. 16) recently tried a jury case against said defendant Southern Pacific Co. and found the jury "selected almost exclusively from business executives, wealthy persons, no such thing as a workingman has appeared on the jury, or *workingmen's wives*" (R. 17); that most of them were CONNECTED in some way WITH THE S. P. CO. so that it was "*impossible* for the plaintiff in a personal injury case to obtain a verdict" (R. 17); that there were *no* "*wage earners*" on the panel (R. 18); that it was a "*typical*" Federal Court jury (R. 18); that plaintiff lost the case altho he would have won in the State Court as it was very clear for the plaintiff (R. 19); that he recently paid a penalty of $271.50 to get a dismissal of a case against the S. P. Co. to file it in the State Court (R. 20) because "the difficulty of winning these cases is KNOWN TO EVERYONE but you have a much better chance with a judge in the Federal Court than with a jury" because "the jury is *so constituted* that it seems to be *prejudiced* against cases of this kind" (R. 21); that out of a population of 635,000 in San Francisco in 1937, there were 40,000 skilled building trades workers and 60,000 laborers and skilled mechanics or a total of 100,000 hired men; that "about *three-quarters* of the population were either working people or members of their family" (R. 21, 22).

Clifton Hildebrand, a prominent jury trial lawyer of 22 years practice, recently tried a jury case against said defendant S. P. Co.; that the verdict was for the defendant altho, it being a passenger case, "ordinarily there would be no question of a recovery" (R. 23); that the jury "was a *typical* jury in this Federal Court, they were all *big business* men, contractors, insurance company executives, practically all of them from California Street or Sansome Street," the financial district, "hardly any of them from

the humble walks of life, *nor laboring people*, at all" (R. 24); that there "were no women at all"; that he "tried many cases in the Federal Court here and I do not recall of having anybody from any of the laboring class, like carpenters *or their wives*, or bricklayers, or shoe clerks, store clerks, nobody at all from any of those, no one except business executives with an occasional clerk, perhaps, from some of their offices", who was "TIED IN WITH THE S. P., or some insurance company, or a railroad" (R. 24); that he has tried about 25 personal injury cases for plaintiffs in the Federal Court (R. 24); that during the past nine years he never won a jury case (R. 25) altho he had much success with juries in the State Courts (R. 24); that he finally had to stop trying cases in the Federal Court because he represented laboring people and they could "not get a fair trial" before a jury of "big business men, insurance men and big executives"; "that the same cases that could be won in the State Court would be lost in the Federal Court"; that it is "*impossible*" to win the case in the Federal Court unless "it is just an open and shut case" but where there is any "doubt" or if the jury "can find any possible reason, they will go for the defendant, in my *experience*" (R. 25); that he is the attorney for the Building Trades Council in Alameda County and for many of the Railroad Brotherhoods; that there are about 70,000 building trades mechanics in Alameda County, 30,000 in the Central Labor Council and about 25,000 operating with different railway brotherhoods, and "with their families they constitute fully 85% of the population of some 300,000" (R. 26).

Plaintiff's counsel then stated that he was able to call more attorneys (his Affidavit mentioned *five* who recently tried jury cases against the S. P. Co. (R. 13)), but it "would be merely *cumulative* to call more attorneys," to which the Court and defendant's counsel nodded their heads in agreement (R. 52).

Then the defendant called a deputy clerk who testified that since 1940, "I can say that there were a large number (of working people), *sometimes 25%*, sometimes 35%. A great many of those however, were *excused*. I have a list of a *few* of them that did serve on the jury" (R. 55, 56); that *105* now remain on this panel (R. 56); that usually about *50%* of the jurors are "so-called *wealthier business men*" (R. 58).

Then defendant's counsel himself testified that he *regularly* transfers all personal injury cases from the State to the Federal Court (R. 65), where he has not lost a case for said defendant S. P. Co. in the past nine years, because he finds the Federal Court jurors are "very fair" (R. 66); that he "*does not know*" that "it is a common opinion among attorneys in San Francisco that it is much more difficult for a plaintiff to win a personal injury case in the Federal Court than in the State Court on the *same facts*" (R. 65).

Both parties rested and after oral argument, Judge Bowen denied plaintiff's motion to strike the panel, *bluntly* stating it was not for him as an outside Judge from Seattle to change this old "system."

Grounds for Motion to Strike Panel

1. Mostly Business Men Selected and Workingmen Excluded.

From the above UNCONTRADICTED evidence if is apparent that there was *deliberate, systematic* and *intentional* discrimination in favor of big business corporations and against wage-earners or those of the labor class. This is definitely improper and illegal.

Glasser v. *U. S.*, 315 U. S. 60, 85 (1942).

Mamaux v. *U. S.*, 6 Cir., 264 Fed. 816 (1920).

Walker v. *U. S.*, 93 F. (2d) 383.
(Respondent's Brief, pages 27-31.)

The jury officials did not even attempt to obtain a fair *cross-section* which would be truly representative of the community and in keeping with our democratic institutions (R. 48, 51).

Glasser v. *U. S.*, 315 U. S. 60, 85.

The applicable state statute governing *qualifications* of jurors requires only "ORDINARY intelligence." But the jury officials judged intelligence by "occupation and residence" (R. 28) and wealth (R. 37).

California Code of Civil Procedure, Section 198.
(Respondent's Brief, Appendix, page 8.)

NONE of the building trades workers, including "machinists" (R. 47), or daily wage-earners (R. 32, 44) PURPOSELY EXCLUDED here are among the list of those *exempted* from jury service under the applicable *state statute*.

California Code of Civil Procedure, Section 200.
(Respondent's Brief, Appendix, page 9.)

28 U. S. C. A. 411 says "*same* exemptions" apply to Federal Court.
(Respondent's Brief, Appendix, page 1.)

"Passing upon applications for excuse (as jurors) is a matter *for the judge* in the exercise of *his* discretion."

U. S. v. *Meyer*, 113 F. (2d) 387, 395 (1940).
(Respondent's Brief, page 70.)

The court may EXCUSE *individual* jurors for good cause shown, but even the court would have no power to direct the *blanket* EXEMPTION of *all* building trades workers and *all* daily wage-earners. Neither could the court delegate such power to the jury officials. It cannot be assumed that *all* were getting big wages and *all* would refuse to serve.

(Juror Morgan, a shipyard worker earning a daily wage, served in *this* case. R. 88, 92.) Obviously, the Clerk and Jury Commissioner had no legal authority to *purposely* omit *all* these workers, as by so doing they were, in effect, adding a *new exemption* to said state statute. They admit they had no directions to do so from the court (R. 32, 49) so their conduct was wholly arbitrary.

The defendant contends that the Clerk and Jury Commissioner had discretion to leave out those who might not want to serve and it cites and relies upon *Rawlins* v. *Georgia*, 201 U. S. 638, 640. However, that case merely holds that a state statute exempting lawyers, ministers, doctors, etc., from jury service (as do most of the state statutes) is constitutional. The court said, furthermore, on page 640: "It does not even appear that any of the defendants belonged to any of the excluded classes." But *Glasser* v. *U. S.*, 315 U. S. 60, 85, sharply limits the "discretion" of said jury officials so they *cannot* make the jury "the organ of any special group or class" regardless of the fact that their "*motives* may be of the best."

The plaintiff's class as "a machinist, a mechanic," his regular "trade" as a daily wage earner (R. 642), was PURPOSELY excluded from ALL panels (R. 47).

As a practical matter, the alleged difficulty of obtaining the 105 jurors for this panel (R. 56) who would represent a fair cross-section of some 2,000,000 people within commuting distance of the court is *purely imaginary*. Surely, the winning of the war would not have been affected as not all were doing war work and the few jurors so engaged would only serve about 6 days during the 4 months period. Besides, none of the workingmen's wives were selected (R. 17, 24). Since the labor class represents at least 75% of the population (R. 21, 26), there was no *valid* excuse for not obtaining a fair, democratic representation therefrom.

The presence of more than 50% of business men on *all* panels (R. 36, 47) is so obviously out of all proportion that it proves discrimination in their favor.

The mere fact that an *illegal* jury selection system has been supinely tolerated for a long time, mainly because attorneys have been reluctant to raise the issue and have despaired of winning against the powerful influences, does not lend any validity to it as it is now being challenged for the first time.

No personal attack is being made upon the integrity of the jury officials as they merely followed the "system." The Jury Commissioner did not even know the applicable code sections controlling "qualifications" and "exemptions" (R. 49).

2. Selection Methods Make It Impossible for Plaintiff to Win.

The UNCONTRADICTED testimony of the two prominent attorneys who testified as expert witnesses for plaintiff shows that it was "IMPOSSIBLE" (R. 17, 25) for plaintiff to even expect to get a verdict where the jury panel is so selected as to be obviously "PREJUDICED" against personal injury cases, especially where the *S. P. Co. was the defendant* (R. 17, 24). "The difficulty of winning these cases is KNOWN TO EVERYONE" (R. 21). It is "the *common, accepted* and *definite opinion* among" attorneys (R. 13, 14). Defendant's counsel naively testified he "does not know" this (R. 65) but he offered *no evidence* to disprove it.

Defendant's counsel freely admitted that he transferred all such cases to the Federal Court where he found the jurors "very fair" and he boasted an unbroken string of victories for the S. P. Co. during the past nine years (R. 65, 66).

Plaintiff cited *Norris* v. *Alabama*, 294 U. S. 587, 589, holding that this Supreme Court will inquire whether a fair trial has been "denied in *substance and effect*" even where the jury selection appears to be fair on its face.

That plaintiff was denied a fair jury trial "in *substance and effect*" is amply demonstrated by the analysis of the 24 jurors actually examined at the trial. At least 19 or 79% were either presidents, vice-presidents or some kind of managers of large firms or independent business men or the wife of same, and all of these were in some way connected with the S. P. Co. (R. 87-123), except the wife of a civil engineer excused by defendant (R. 111, 113). At least 21 or 87.5% were *admittedly* connected in some way with the S. P. Co. (R. 87-123). Also, 5 or 20% were insurance brokers or insurance executives doing business and or meeting socially with S. P. Co. *officials* (R. 100, 102, 108, 112, 116). This is out of all proportion and proves discrimination in favor of one type of business. Incidentally, the Jury Commissioner was also an insurance broker (R. 46).

The selection of most jurors from the "downtown business district" (R. 51) where they were "connected with some *big business* concerns" (R. 47) made it INEVITABLE that most would have business or other connections with the S. P. Co. since it is the *only* railroad actually entering San Francisco.

The jury verdict in about 10 minutes (R. 78), hastened by Juror Helweisner who became foreman (R. 74), an insurance broker who admitted he played golf with S. P. Co. *officials* who were members of his club (R. 102) does not help to dispel any of the unpleasant odor surrounding this jury "system."

The two billion dollar S. P. Co. which places large and expensive ads in all the newspapers to hush up unfavorable

publicity and even to distort the facts as was done *during* the trial of this case, did not hesitate to take the fullest advantage of this *unfair* jury "system." When plaintiff tried his best to waive the jury because he despaired of ever getting a verdict from such a jury, the defendant insisted upon and *demanded* the jury trial here (R. 70-72). The poor, crippled plaintiff has been compelled to fight against such influences and almost hopeless odds.

The 7th Amendment to the United States Constitution provides that in civil cases "the right to trial by jury shall be preserved."

In *Pratt* v. *Pratt*, 74 Pac. 742, 744, 141 Cal. 247, 252, the State Supreme Court, in reversing the lower Court, said: "The trial of a case should not only be fair in fact, but it should *also appear fair*. And where the contrary appears, it SHOCKS THE JUDICIAL INSTINCT *to allow the judgment to stand*."

3. No Apportionment by Districts.

The Federal Statute says:

> "*Same* (Jurors); *apportioned in district*. Jurors shall be returned from *such parts of the district*, from time to time, as the *court shall direct*, so as to be *most favorable* to an *impartial trial*, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service."
>
> 28 U. S. C. A. Sec. 413.
>
> (Respondent's Brief, Appendix page 3.)

But here the Court gave no directions and prescribed no rules (R. 32, 49). It was the *duty* of the Court to "direct" apportionment in the district and this power could not be delegated to the jury officials. However, the Judges "leave it *entirely* to" them (R. 49), with the result that "AT LEAST 50%" are selected from the "BUSINESS DISTRICT of San

Francisco" (R. 51). This "business district" comprises less than one per cent of the judicial district of said Court.

4. Discrimination Against Women as Jurors.

The Clerk says he does "not pay any attention to the proportion" of women he selects and makes no effort to give them equal representation with men (R. 32). The Jury Commissioner goes even further and says he has "PURPOSELY put on *more men* than women" (R. 49) and gives his own arbitrary reason saying it is a "hardship" for them to serve because of their "housekeeping, motherhood, and the rest" (R. 48). This is absurd as only about 53 women would be needed from some 1,000,000, thousands of whom were unmarried, widowed or had grown children.

Just 4 or only *16%* of the 24 jurors actually examined at the trial were women and *none* of these was the wife of a workingman or of the labor class (R. 93, 95, 111, 120). The printed panel of 105 jurors in *this* case (R. 56) contained 22 women or only *21%*.

However, only the court can pass on applications for *excuse* from jury duty. *U. S.* v. *Meyer*, 113 F. (2) 387, 395. The court cannot even delegate this power to the jury officials who here, in effect, were adding a *new partial exemption* to the State Statutes which list the definite exemptions. California Code of Civil Procedure, Section 200 (Respondent's Brief, Appendix page 9).

The defendant has completely overlooked *U. S.* v. *Roemig*, 52 F. Supp. 857 (1043), holding that any discrimination against women as jurors is ground for quashing the panel. The case of *U. S.* v. *Ballard*, 35 F. Supp. 105, followed by *U. S.* v. *Chaplin*, 54 Fed. Supp. 682, and holding to the contrary should be disapproved because the Federal Court is bound *only* by the state "qualifications" which do *not* exclude women and is bound only by the state "exemptions"

which do *not* exempt women. California Code of Civil Procedure, Secs. 198, 199, 200 and 205.

Plaintiff was prejudiced by the discrimination against women as he desired a fair representation and complained about it in his Motion (R. 10) and Affidavit (R. 12) but he had only two women on the jury (R. 92, 95).

5. Discrimination Against Other Races.

Since plaintiff is a Caucasian, the omission of other races does not concern him so directly. However, the conduct of the jury officials in making no effort to give other races some fair representation (R. 33, 49) illustrates the indifferent, careless and illegal "system," operating with no rules or other supervision prescribed by the Court (R. 32, 49).

6. Failure of Judges to Prescribe Rules.

The failure of the Judges to prescribe any rules (R. 32, 49) altho they could do so under *Pointer* v. *U. S.*, 151 U. S. 396, *407*, explains the Jury Commissioner's frank admission that he did *not even know* the applicable state code sections controlling all "qualifications" and "exemptions" of jurors (R. 49).

The failure to *direct* apportionment has been mentioned above.

7. No Prior Examination of Jurors.

If the Judges prescribed rules and directed the mailing of questionnaires to all persons believed eligible, a fair cross-section could be obtained and those who are exempted *by statute* because of their occupation, ill health or non-citizenship could be quickly eliminated.

Conclusion

It is respectfully submitted that the challenge to the array should have been allowed because the jury panel was not selected in conformity with law.

Clinton v. *Englebrecht*, 13 Wall. 343. (1872, Judgment reversed.)

The judgment should now be reversed and the District Court directed to supervise the drawing of a panel which will be a democratic cross-section and truly representative of the community. The District Court should also be directed to prescribe some fair rules to guide the jury officials, and at all events to perform its duty in directing the portions of the district from which jurors are to be returned. To avoid any suspicion of a "hand picked" jury panel, said rules should provide that the selection should be by *lot* from *all* eligible citizens as is done by rule in the State Court.

Dated, San Francisco, California, March 19, 1946.

GILBERT E. THIEL,
Petitioner pro se,
% Allen Spivock,
1025 Russ Building,
San Francisco 4, Calif.